Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT

No.09-643

CARL H. BROWN,

PETITIONER,

v.

MARRIOTT INTERNATIONAL

RESPONDENT.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

Submitted January 13, 2010

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Marriott's Opposition is short of factual support and long on baseless rhetoric. Marriott attempts to discredit the irrefutable evidence of pretext with new and shifting explanations.

I. Brown's Confusion of the Job Requirements During the Interview Was a Direct Result of Fried Telling Brown That the Position Had Changed.

Marriott asserts that Brown was seemingly confused about the job requirements. It would be reasonable for Brown to be confused about the job requirements when the interviewer tells him the job requirements have changed and that he was no longer a good fit. Saying that to any candidate during an interview would cause confusion. The contemporaneous e-mail by Brown asserting that Marriott had changed the job requirements on him is unchallenged and unrepudiated by Marriott. Marriott was so conscious of having told Brown that the requirements had changed that during the EEOC investigation, Fried did not even admit she interviewed Brown. Further, Marriott even changed the job posting description. It is incredible Marriott can claim the second interview to be anything more than a cover up attempt especially when you tell a candidate that the job requirements had changed.

Marriott's assertion that Brown expected the position to be a purely technical one is controverted by the evidence. Brown's submitted resume shows managerial duties and skills. Brown responded to a job announcement titled "COBOL Production Support Manager". Brown even told Fried he had managerial experience at IBM. He was clearly aware and expecting to interview for a managerial

position. Marriott's claim that Brown was seeking only a technical position is baseless and is yet another shifting explanation proffered by Marriott.

II. For the First Time, Marriott Now Argues the Person Does Not Need to Be An Expert In COBOL, SQL, DB2, and Programming.

At no time below did Marriott argue the candidate need not be an expert. In fact, Marriott argued the exact opposite, alleging that Bedard did have expertise in COBOL, a point not disputed by Marriott below. Only when the depositions revealed that Bedard was not an expert, Marriott back peddled and now asserts the present shifting explanation that it was not seeking an expert in COBOL. If indeed Marriott did not want an "expert", why did Marriott have Bedard falsify his resume to state that he had "expertise" in COBOL, DB2, SQL, and structured programming? The more Marriott spins this, the more incredulous and flawed their argument appear. Accordingly, as ruled in *Holland*, shifting and inconsistent answers are evidence of pretext. *Holland v. Washington Homes Inc.*, 487 F. 3d. 208, 214 (4th Cir. 2008).

III. Bedard Was Not Even Equally Qualified.

Marriott tries to suggest Bedard was equally qualified for the subject position citing case law that an employer is entitled to select from equally qualified candidates. The problem is Bedard was not qualified for the position having at best only novice knowledge of the required skill set. Contrary to Marriott's assertion that without an expert, Bedard's

knowledge cannot be evaluated, an expert is not needed because on the record at depositions, Bedard flat out admitted he was a novice, and could not answer a single basic COBOL, SQL or DB2 question, which draws serious suspicion whether he even has a basic understanding or any understanding in the subject for that matter.

Furthermore, Miller, the candidate Marriott hired on an interim basis also lacked the requisite skill set. The comparative treatment analysis shown in Petitioner's Writ clearly shows the disparity in treatment and preference for white candidates. Marriott cleverly refuses to address these disparities head on, and instead chooses to create the impression of being unbiased by arguing it had hired a black candidate named Foster for a totally different and unrelated position years ago, a candidate not even hired by Fried, thus completely irrelevant to the present case.

IV. Marriott Tacitly Admits that the District Court Ignored Brown's Evidence of Pretext.

The best Marriott can do is attempt to inoculate the falsified resume by stating Marriott did not tell Bedard to falsify his resume but rather Bedard tailored the resume to fit the description he heard about without any prompting from Marriott. Quite the contrary, the record is unmistakable. Marriott sought out Bedard who testified that Marriott's recruiter Rex Meghan specifically told him to submit a new resume that stated he had expertise in COBOL, SQL, DB2, and structured programming. This is clearly a direct act of influencing a candidate to falsify his resume. Trying to equate Marriott's

contributory act of falsifying a candidate's resume to the fact that Brown had a different version of his resume showing a slight variation on one of his past employment period is incomparable. Marriott further kept the existence of the falsified resume away from the EEOC investigation.

Petitioner set forth an entire table of facts demonstrating evidence of pretext. Brown proffered greater weight of pretext evidence than Marriott could rebut. Yet, the lower courts simply ignored the evidence failing to even explain how the body evidence was not relevant or indicative of pretext. Instead, the District Court simply made a bald assertion that Brown did not meet his burden of proof on pretext, which Respondent tacitly agrees by asserting the same generalized comment. Ignoring the proffered evidence of pretext without any explanation is certainly not the standard set forth by this Court in *Burdine*.

CONCLUSION

The Fourth Circuit erred in affirming the District Court's grant of Summary Judgment in favor of Marriott. The decision should be reversed, and the matter remanded to the District Court for an evidentiary hearing. In the very least, the Fourth Circuit and the District Court should be required to perform a thorough pretext analysis where it not only considers evidence to a standard of preponderance but considers the comparative and *prima facie* evidence in the pretext analysis.

Respectfully submitted,

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